Fear of Unaccountability vs Fear of a Pandemic: COVID-19 in Hong Kong

Geoffrey Yeung 2020-04-14T08:49:26

When news began to circulate about a novel virus in December 2019, Hong Kong was in the midst of protests that had been going on for months. There were (and continue to be) widespread demands for accountability and democracy, accompanied by a significant degree of public distrust and dissatisfaction towards the Government. Pertinently, the Government had just invoked hugely controversial emergency powers to quell the protests. Hong Kong was also one of the hardest-hit regions during the SARS epidemic 17 years ago, and there was a collective determination not to repeat the tragedy.

All these influenced Hong Kong's – both the Government's and the citizen's – responses to the COVID-19 pandemic. Emergency measures have been put in place in Hong Kong earlier than in most countries, but citizens have demanded more to be done while at the same time harbouring greater concern for potential abuse. After outlining the legal framework and the measures which have been taken to far, I will evaluate the legal situation and offer some of my own personal reflections.

Executive-made Emergency Regulations

In Hong Kong, the Government may make emergency regulations under several statutes. One is the Emergency Regulations Ordinance (Cap. 241) ("ERO"), and another is the Prevention and Control of Disease Ordinance (Cap. 599) ("PCDO").

The ERO empowers the Chief Executive ("CE") – the head of the Government – to make regulations on extremely broad terms. Under the ERO, the CE may, on any occasion which she "may consider to be an occasion of emergency or public danger", make "any regulation whatsoever" which she "may consider to be in the public interest" (s.2(1), ERO). The ERO was enacted nearly a hundred years ago and has an unsavoury history in the colonial era. In October 2019, the CE invoked the ERO to create an anti-mask regulation to ban masks at public gatherings, in an attempt to quell the ongoing protests. This was hugely controversial, and the Court of First Instance held soon afterwards that the ERO was "unconstitutional" to a certain extent, though stopped short of striking it down entirely, and also held that the anti-mask regulation constituted disproportionate restriction to fundamental rights (link to judgment). However, the Court of Appeal partially allowed the Government's appeal, holding instead that the ERO was constitutional and the anti-mask regulation was also partly constitutional (link to judgment). A further appeal to the Court of Final Appeal is possible.

The PCDO was enacted much more recently in 2008 to, according to its Legislative Council Brief, enable compliance with the International Health Regulations (2005)

of the World Health Organization and to implement recommendations from a review of the SARS experience. The Secretary for Food and Health and the CE may make regulations under the PCDO for certain defined purposes (ss.7-8). The occasion in which the CE may make regulations (i.e. a "public health emergency") is defined (s.8(5)); there is a requirement to review the public health emergency from time to time (s.8(2)); and the penalties that can be prescribed under these regulations are limited (s.7(3) and 8(4)).

Legislative and judicial oversight over executive legislation are available but limited in the circumstances. Regulations made under the PCDO are subsidiary legislation. This means that after they were made, they would be tabled before the Legislative Council ("LegCo") for 28 days of "negative vetting", during which the regulations would already be in force but LegCo may still propose amendments to them. However, half of the LegCo is not democratically elected (which was arguably one of the reasons behind the protests) and it is practically impossible for the LegCo to amend the regulations without Government support, which critically undermines the legitimacy and effectiveness of LegCo's oversight.

There is also a possibility of judicial review if the regulations are *ultra vires*. However, the room for such review is limited, given the broad scope of power under the PCDO (and especially the ERO). Courts can also strike down regulations that constitute disproportionate restrictions to fundamental rights (including those under the International Covenant on Civil and Political Rights). In the most recent Court of Appeal judgment on the ERO and the anti-mask regulation made thereunder, the Court asserted that it is "constitutionally and institutionally well-placed" to make proportionality assessment in respect of emergency regulations and thus adopted a relatively strict standard of scrutiny towards the anti-mask regulation (see the judgment at §162). However, whether the Court will accord a greater deference to the Government in a public health emergency is unclear.

Phase 1 of the Response – Closures and Nudges

From January to mid-March 2020, the Government mainly relied on executive measures invoking existing statutory powers to close schools and publicly managed premises, as well as to nudge the population into voluntary compliance with social distancing practices. Executive legislation was also made, but they were relatively limited and mainly aimed at limiting cross-border transmission.

After the Lunar New Year holidays, the Government suspended all classes and effectively closed all school premises. In addition, the Government told civil servants to work from home, and suspended many government services. Public facilities under the Government's management were closed, including stadiums, museums and libraries. The Government called on the private sector to also allow their employees to work from home, and many private employers have reportedly allowed such arrangements. The Judiciary also played a role, as court proceedings were generally adjourned and court registries were closed. There were some concerns that some of these measures may not have a firm statutory footing, and it would be

fair to say that the relevant authorities had not taken a proactive step to explain their legal bases.

As for stopping importation of cases from affected regions, after an initial period of reluctance, the Government gradually closed most of the land borders with Mainland China. However, this still fell short of public demands for even tougher measures, including completely stopping cross-border travel from Mainland China where the outbreak was most serious at that time.

Eventually, the Government resorted to making emergency regulations, but its impact was relatively limited at least vis-à-vis the general public. In early February, the CE made emergency regulations under the PCDO to compulsorily quarantine all persons arriving from Mainland China, Macao or Taiwan for 14 days (the "599C Regulation") in order to curtail cross-border passenger flow, and to empower health officers to require disclosure of information (the "599D Regulation") in order to assist in getting reliable travel histories from patients and travellers.

These regulations were announced on 5 February, and they came into force on 8 February. Both regulations were set to expire in 3 months' time (s.12, 599C Regulation; s.5, 599D Regulation).

Phase 2 of the Response – More Emergency Regulations

During the initial phase, the infection rate in Hong Kong had remained steady. By early March, some of the measures above had even begun to be scaled back.

However, the public health crisis then re-escalated. Since around mid-March, Hong Kong has seen a surge in cases, coinciding with the acceleration of the outbreak in the West. Clusters of local cases also emerged from, for example, bars and gyms.

In response, the Government not only extended the measures mentioned above, but also made further emergency regulations under the PCDO. All these new regulations have, like previous ones, been set to expire in 3 months' time (s.13, 599E Regulation; s.15, 599F Regulation; s.16, 599G Regulation).

The CE first made another regulation to extend compulsory quarantine arrangements to all travellers coming from abroad (the "599E Regulation").[1)]Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E) This was announced on 17 March and the regulation came into force on 19 March.

The CE then made two more regulations, which had far greater implications on daily lives and fundamental rights (including private property rights and the freedom of assembly) than all previous ones. Both regulations were announced on 27 March and came into force one or two days later. One of them was in relation to businesses and premises (the "599F Regulation").[2)]Prevention and Control of

Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F). This regulation, first, empowered the Secretary for Food and Health to specify periods of no more than 14 days, during which catering businesses are required to cease selling food or drinks for consumption on premises (ss. 3 to 5). No such period has yet been specified so far. Second, the 599F Regulation also empowered the Secretary to require catering businesses and certain other premises to comply with directions that may be issued for periods of no more than 14 days (ss. 6 to 9). In respect of catering businesses, the Secretary has issued certain directions including, for example, that there must be a distance of at least 1.5m or some partition between one table and another, and that at most 4 persons may be seated together in each table. The Secretary also issued directions to other premises, such as bathhouses and fitness centres, to close.

While the 599F Regulation may have had an impact on private property rights, the other regulation in relation to group gatherings (the "599G Regulation") severely curtailed the freedom of assembly.[3)]Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G). This regulation empowered the Secretary for Food and Health to specify periods of no more than 14 days each, during which no gathering of more than 4 persons may take place in any public place. The Secretary has invoked this regulation and prohibited group gatherings since 29 March. Certain gatherings are exempted, such as those for the purposes of transportation, for performing any governmental function, or at a place of work for the purposes of work (s.3(2)(a) and Sch 1).

Notably, no exemption is given for any form of political assemblies, a subject that may be of particular concern given the recent socio-political circumstances in Hong Kong. Also of concern are the relatively extensive powers granted to officers appointed under both of the new regulations (which may include police officers), such as powers to enter any premises without a judicial warrant (s.12(1)(a), 599F Regulation; s.11(a), 599G Regulation).

Indeed, allegations of abuse under these new regulations have already begun to emerge, especially when they were used in ongoing political protests or against businesses perceived to be pro-protesters (link in Chinese). Whether such allegations are justified or not, their early emergence indicates a fear of unaccountability arising from the socio-political circumstances.

Reflections

Tackling a pandemic requires extraordinary levels of coordination. In Hong Kong, it may be that initially much of this came from the citizenry's voluntary compliance with measures such as social distancing. Executive measures imposed by virtue of existing statutory powers may also have contributed in nudging the public, especially private employers, into even better compliance. Emergency regulations, though coercive in nature, had a targeted focus at travellers and/or patients.

However, as the crisis re-escalates in Phase 2, increasingly coercive powers have been invoked by way of further emergency regulations, bringing the potential

for abuse into spotlight. Concerns for abuse of emergency powers are universal and have been highlighted by experts at the UN, but in Hong Kong they can be exacerbated by the democratic deficit in the political system and the fear of unaccountability arising from recent socio-political events.

There is perhaps no answer to such scepticism without fundamental political reforms. In the immediate circumstances, it would be imperative on the Government to go the extra mile in assuaging such concerns. The following lessons may be worth bearing in mind.

First, the Government must ensure that its measures have a solid legal foundation. The rule of law is particularly important in times of emergency. The Government should publicly explain the legal bases for their measures taken, such as closure of schools, and remedy any legal deficiency that emerges. Necessity of the measures do not justify acting without the authority of law.

Second, the Government must ensure that its measures are compatible with human rights. It may be doubtful, for example, whether it is indeed necessary to allow warrantless entry into private premises under the more recent regulations, which can be a hotbed for abuse. Quite apart from human rights concerns, unnecessarily intrusive powers can also backfire and undermine the legitimacy as well as effectiveness of the emergency regulations.

Third, the Government must carefully consider the legislative framework within which executive legislation is made. In the absence of public trust in the government, only a carefully drafted and properly targeted legal framework with express limitations on the government's power can be somewhat assuring. And in Hong Kong, in the absence of better alternatives, the PCDO is clearly preferable to the ERO in this regard.

Fourth, executive legislation should contain sunset clauses, and use of powers thereunder should be reviewed from time to time. This provides some assurance that extraordinary measures would not extend beyond extraordinary times. The 599F Regulation is an interesting legislative model in this regard: it effectively requires the Government to reconsider the directions issued every 14 days (which may also open up an opportunity for judicial review every now and then) within the context of a regulation that itself expires in 3 months.

Fifth, proper legislative scrutiny should be afforded even to emergency legislation. This may improve the quality of drafting and accord greater legitimacy to the powers exercised. In this respect, a potential cause for concern in the 599F Regulation may be that, while the directions issued by the Secretary are arguably the real thrust of the regulation, the directions are not themselves classified as subsidiary legislation (pursuant to ss. 6(4)(b) and 8(4)(b)) and are therefore exempt from any scrutiny by the LegCo.[4)]The author thanks Kai Yeung Wong (Edward) for inspiration on this point.

Finally, coercive powers exercised by a distrusted authority will inevitably foment scepticism and resentment, even if such powers may be, objectively speaking,

necessary to tackle the pandemic. As recent polls suggest, the Government would be well advised not to read any temporary acceptance of emergency powers as a dilution in popular demands for accountability and democracy.

References

- 1. Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E
- 2. Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F).
- 3. Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G).
- 4. The author thanks Kai Yeung Wong (Edward) for inspiration on this point.
